### IN THE COURT OF APPEALS OF IOWA

No. 8-329 / 07-1207 Filed October 1, 2008

## STATE OF IOWA,

Plaintiff-Appellee,

vs.

# MICHAEL A. METTE,

Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Monica L. Ackley, Judge.

Defendant appeals from his assault causing serious injury conviction.

REVERSED AND REMANDED.

Mark McCormick, Des Moines, Steven Rueckert, Chicago, Illinois, and Jay Schweitzer, Columbus Junction, for appellant.

Thomas J. Miller, Attorney General, Linda Hines, Assistant Attorney General, Ralph Potter, County Attorney, and Timothy Gallagher, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Vogel and Eisenhauer, JJ.

#### **PER CURIAM**

Michael Mette appeals from his conviction of assault causing serious injury. He asserts that the district court erred in rejecting his self defense claim and in finding his victim suffered serious injury. Because we conclude the district court's finding that Mette had an opportunity to retreat is not supported by substantial evidence, we reverse.

## I. Background Facts and Proceedings

Mette was charged with assault causing serious injury in violation of Iowa Code sections 708.1(1) and 708.2(4) (2005) as a result of a physical altercation between himself and Jacob Gothard in Dubuque, Iowa on October 9, 2005. Through pretrial proceedings, Mette gave notice he intended to rely on his assertion of self defense. He waived his right to a jury trial and the matter was tried to the court.

The testimony at trial revealed the following facts. On October 8, 2005, Mette traveled from his home in Chicago, Illinois to Dubuque, Iowa to visit his brother, Marc Mette. Following a night out, they returned to Marc's home with several friends, Mark Cleve, Jason Crane, Mark Huber, and Christopher Tanner. They parked their car in front of Marc's home, and walked down the street to a house where there was word a party was in progress. At approximately 3:00 a.m., the group arrived at Nicholas Boyd and Jacob Gothard's house and was invited in. After discovering that nobody else was there, Gothard and the group began arguing. One individual in the group took Gothard's cell phone. The group left Gothard's home and walked back towards Marc's home, where they stood outside talking and making plans for the following day. Boyd and Gothard

came out of their house, ran up the street toward the group, and were yelling and threatening the group with physical violence. Another argument began, but this time it resulted in a physical altercation.

After some threats, pushing and shoving, Mette punched Gothard in the face, knocking him to the ground and rendering him unconscious. A police officer arrived moments later, and only Boyd, Gothard, Marc Mette, and Michael Mette were present. The officer tended to Gothard, who was unconscious and bleeding. Other officers arrived and began questioning Boyd, Marc Mette, and Michael Mette, who all reported that Gothard had been drunk and fell down. An officer noticed blood on Michael Mette's hand and shirt and questioned him further. Mette then admitted to punching Gothard.

Paramedics arrived and immobilized Gothard with a cervical collar and spine board. Gothard was taken by ambulance to Finley Hospital. Upon arrival, Gothard was unconscious and CT scan and X-rays revealed that Gothard had multiple hemorrhages in the brain and a fractured cheekbone, nose, and jaw. Gothard's blood alcohol content was .270. The emergency room physician concluded that Gothard needed to be transported to the University of Iowa Hospital for neurological evaluation as Finley Hospital did not have those capabilities. At the University of Iowa Hospital, Gothard was admitted to intensive care for observation. It was later determined that his injuries were not as extensive as first believed.

As the district court noted, the testimony at trial was a "hodgepodge of recollections," especially in light of the level of intoxication of the individuals involved. The district court concluded that the justification of self defense was

not available to Mette because he did not retreat and could have done so. The district court found Mette guilty of assault causing serious injury pursuant to lowa Code section 708.2(4). Mette filed a combined motion for a new trial and in arrest of judgment asserting that there was sufficient evidence to support a justification defense and insufficient evidence to support the finding of serious injury. The district court denied Mette's motion. Subsequently, he was sentenced to five years in prison. Mette appeals.

#### II. Standard of Review

Our review is for errors at law. *State v. Leckington*, 713 N.W.2d 218, 221 (lowa 2006).

The district court's finding of guilt is binding on us unless we conclude there was not substantial evidence in the record to support such a finding. In determining whether there was substantial evidence, we review the record in the light most favorable to the State. Substantial evidence means such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt.

State v. Taft, 506 N.W.2d 757, 762 (lowa 1993).

### III. Justification of Self Defense

Mette asserts that the district court erred in rejecting his self defense claim because he was unable to retreat from the situation. "A person is justified in the use of reasonable force when the person reasonably believes that such force is necessary to defend oneself or another from imminent use of unlawful force." lowa Code § 704.3; see lowa Code § 704.1 (defining reasonable force). Once raised, the burden is on the State to prove beyond a reasonable doubt that the asserted justification of self defense did not exist. State v. Rubino, 602 N.W.2d 558, 565 (lowa 1999). The State may meet its burden by proving any of the

following: (1) the defendant initiated or continued the incident resulting in injury; or (2) the defendant had an alternative course of action, which was not utilized; or (3) the defendant did not have reasonable grounds for the belief he was in imminent danger of injury or death; or (4) the defendant did not actually believe he was in imminent danger of injury or death; or (5) the force used by the defendant was unreasonable. *Id.*; *State v. Thornton*, 498 N.W.2d 670, 673 (lowa 1993).

Following the argument in Boyd and Gothard's home, Michael Mette, Marc Mette, Cleve, Crane, Huber, and Tanner were all standing outside of Marc Mette's home. Boyd and Gothard came out of their house, ran up the street toward the group, and were yelling and threatening the group with physical violence. Once Boyd and Gothard reached the group, another argument ensued. Boyd pushed Michael Mette and Marc Mette. Boyd then noticed Christopher Tanner in the street, who was chuckling at the whole situation, and went into the street to confront Tanner. Gothard remained on the sidewalk with Michael Mette.

The testimony of the witnesses differs as to what happened next. Michael Mette testified that Gothard had pushed him, fists to the chest, three times, knocking him backwards and telling him he was going to beat him up if he did not return the cell phone. On the fourth time, because it appeared to Michael as though Gothard was going to punch him, he punched Gothard first.

Gothard testified that he pushed Marc Mette twice in order to keep him an arm's length away. Michael Mette then warned him that if he touched his brother again, he would hit him. Gothard again pushed Marc Mette back and Michael

Mette hit Gothard.<sup>1</sup> When asked if he ever laid his hands on or struck Michael Mette, he responded: "Not that I remember."

Marc Mette testified after Boyd and Gothard approached the group, Boyd made contact with his brother and then himself and then went into the street and pushed Tanner multiple times. Marc Mette and Crane went into the street to assist Tanner. Marc did not see anything that happened on the sidewalk, including his brother hitting Gothard. Michael Mette then came into the street to assist the others. At this time, Boyd had calmed down and Marc and Michael Mette began talking to him. They then went to check on Gothard.

Mark Huber testified that everyone followed Boyd into the street, except for Huber, Gothard, and Michael Mette. Huber then saw Gothard was "getting in [Michael Mette's] face" and Gothard pushed Michael Mette, hard enough to knock him back a couple of feet. Then he saw Mette punch Gothard.

Jason Crane testified that Boyd and Gothard came running towards the group and then threatened to beat them all up. Boyd then went into the street after Tanner. Crane and Marc Mette followed Boyd into the street and attempted to diffuse the situation. Crane did not see Michael Mette punch Gothard, and moments later Michael Mette came into the street to help calm down Boyd.

Christopher Tanner testified that Boyd approached Marc Mette and Michael Mette, "got in their face," and shoved them. Then Gothard shoved Michael Mette. Tanner, who "thought it was kind of funny," began chuckling a little bit. Then Boyd came into the street and shoved Tanner a couple of times.

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<sup>&</sup>lt;sup>1</sup> Gothard testified that he does not remember anything after being punched. Additionally, his testimony was very similar to Officer Craig Salmonson's testimony.

Crane and Marc Mette came into the street to Tanner's aid. Boyd was arguing with Crane, Marc Mette, and Tanner in the street when Michael Mette came to see what was going on. Tanner did not see Michael Mette punch Gothard.

Boyd testified that he aggressively approached the group, but never physically touched anyone. Rather he approached the group to talk to them and then went into the street to talk to Tanner. During the conversation with Tanner, he looked over to the sidewalk and saw Marc Mette and Michael Mette making stomping motions toward the ground, but his view was obstructed by a car and he could not see the ground. He did not report this to the police officers once they arrived and again did not report it to police officers the following month when questioned about the events of that night.

Most of the witnesses agree that after Gothard was knocked to the ground, Michael Mette took off his shirt and approached the group arguing in the street. However, things calmed down and everyone left the area except for Marc Mette, Michael Mette, and Boyd, who all initially agreed they would report that Gothard was drunk and had fallen down. Officers arrived shortly thereafter to discover Gothard unconscious.

Officers began questioning the three individuals remaining at the scene.

Officer Craig Salmonson testified that once the officers arrived at the scene and began questioning Michael Mette, Mette admitted that he had punched Gothard.

Mette reported that Gothard had pushed his brother, and he then warned Gothard that he would punch Gothard if Gothard pushed his brother again.

Gothard did push Marc Mette again and Michael Mette punched Gothard.

However, later while in jail, Michael Mette reported to Officer Salmonson that Gothard also had pushed him.

From the testimony, the district court found that:

Jake was "getting into the face of Mike Mette. Jake pushed Mike at least two times, maybe three. After the last push, Mike planted a fist into Jake's face that knocked Jake to the ground. Jake's head hit the cement. He was unconscious.

Following the arrival of officers to the scene, the district court found:

The story of how Jake fell was proffered but did not ring true to Officer Craig Salmonson. He saw blood on Mike's shirt and hand. Mike pulled the officer aside and told him, "I hit him." When asked how many times he hit Jake, Mike responded with the answer, "one time." Mike contends he told Officer Salmonson about Jake pushing more than three times before the blow was dealt. Officer Salmonson indicated it was not until Mike was in jail did this information become known.

Finally, the district court concluded:

[Michael Mette] was not the initial aggressor of this incident. [Boyd and Gothard] came at the group of six by [Marc Mette's] house in a threatening manner. It was reasonable under the circumstances to believe that harm might come to any one of the individuals standing outside on the street. What the defendant failed to do however, was to retreat from the situation to avoid any problems. All any of the six had to do was get in the car, go inside the house, or walk away and call the police about the disturbance. Because of his failure to take these steps, the court cannot find that the self-defense justification is available to permit the striking of [Gothard].

We first note that the whole incident lasted only a couple of minutes and due to the intoxication of most, if not all of the individuals, the testimony differed in details. Lighting was poor and the facts are sketchy and disputed. According to Michael Mette, his encounter with Gothard lasted only ten seconds. As Michael testified:

- A. He hit me three times, the fourth time, it looked like he was going to punch me. I mean, I had no doubt that he was about to, you know, hit me.
- Q. And would he have hurt you if he was able to hit you? A. Sure. He's actually, if I - I mean, he was taller, he's bigger than I am.

. .

Q. And was there an opportunity for you to get way from Mr. Gothard? A. No. Like I said, it was - - it all happened, bang, bang.

As Michael raised the defense of self defense, it was the State's burden to prove beyond a reasonable doubt that such defense was not available to him. *Rubino*, 602 N.W.2d at 565. A close review of the record confirms the district court's findings are all supported by the testimony, except the finding that Michael had an opportunity to retreat. The court clearly found Mette "was not the initial aggressor" and "[i]t was reasonable under the circumstances to believe that harm might come to any one of the individuals standing outside on the street." However, there is absolutely no testimony from any of the witnesses to support the district court's findings:

What the defendant failed to do however, was to retreat from the situation to avoid any problems. All any of the six had to do was get in the car, go inside the house, or walk away and call the police about the disturbance.

After being pushed and knocked backwards two or three times, there was nothing in the record to indicate Michael could have avoided Gothard's next blow, without his defensive punch. While it may be possible to speculate on Michael's ability to retreat, the record is utterly void of any testimony to support that assumption. See State v. Coffman, 562 N.W.2d 766, 768 (Iowa Ct. App. 1997) (stating that the evidence must raise a fair inference of guilt and [do] more than create speculation, suspicion, or conjecture"); see also Iowa Code § 704.1

(stating that a person need not seek an "alternative course of action" if the "alternative entails a risk to life or safety, or the life or safety of a third party"). Given the State's unmet burden of proof, we conclude the district court erred in rejecting Mette's defense of justification.

As we conclude the State did not meet its burden of proof, we need not consider Mette's argument that the district court erred in finding Gothard suffered serious injury. We therefore reverse and remand for entry of judgment of acquittal.

## REVERSED AND REMANDED.